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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

WASHINGTON TOXICS COALITION,)	
NORTHWEST COALITION FOR	)	Civ. No. C01-0132C
ALTERNATIVES TO PESTICIDES,)	
PACIFIC COAST FEDERATION OF)	
FISHERMEN'S ASSOCIATIONS, and	)	REPLY IN SUPPORT OF PLAINTIFFS'
INSTITUTE FOR FISHERIES RESOURCES,	)	MOTION TO MODIFY JULY 2, 2002
	)	ORDER TO ESTABLISH SCHEDULE FOR
Plaintiffs,	)	DEFENDANT TO REVISE THE
	)	REQUIRED EFFECTS DETERMINATIONS
v.	)	AND PROVIDE ADEQUATE
	)	FOUNDATION FOR CONSULTATIONS
ENVIRONMENTAL PROTECTION)	
AGENCY, and STEPHEN L. JOHNSON,	)	NOTE ON MOTION CALENDAR:
Acting Administrator, ¹	)	FRIDAY, MARCH 25, 2005
)	
Defendants,)	
)	
AMERICAN CROP PROTECTION)	
ASSOCIATION, et al.,)	
)	
Intervenor-Defendants.)	

¹ Please note that pursuant to Fed. R. Civ. P. 25(d)(1), Stephen L. Johnson, Acting Administrator, is substituted as a defendant for Michael O. Leavitt, Administrator.

REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO MODIFY
JULY 2, 2002 ORDER TO ESTABLISH SCHEDULE FOR
DEFENDANT TO REVISE THE REQUIRED EFFECTS
DETERMINATIONS (C01-0132C)

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1 Despite the passage of nearly three years since this Court directed EPA to initiate
2 consultations, defendant Environmental Protection Agency (“EPA”) has completed no
3 consultations on any of the 55 pesticides subject to the July 2002 Order. Indeed, consultations
4 have begun on only one of the pesticides. For the others, EPA has produced insufficient
5 scientific information for both its effects determinations and the consultations. Accordingly,
6 EPA will need to redo its effects determinations before the consultations can be conducted.

7 In response to this Court’s July 2, 2002 Order, EPA began making effects determinations
8 using its longstanding risk assessment process. However, both the National Marine Fisheries
9 Service (“NMFS”) and the Fish and Wildlife Service (“FWS”) criticized that process for
10 ignoring many types of significant impacts from the pesticides, such as sublethal, indirect, and
11 cumulative effects. Plaintiffs Washington Toxics Coalition et al. submitted several such
12 critiques to this Court. See 4th Decl. of Aimee Code ¶¶ 5-11 & Exhs. 1-3 (May 2003). Over
13 time, EPA responded to some of the Services’ criticisms by revising its risk assessment process
14 to provide for consideration of such effects and of data that had previously escaped EPA review,
15 as described in EPA’s “Overview of the Ecological Risk Assessment Process” (“Overview”).

16 EPA attached to its opposition to this motion a letter from EPA to NMFS in which EPA
17 represents that it will “review, and update as appropriate, its assessments of the ecological risks
18 of these pesticides . . . to ensure the assessments follow the approach described in EPA’s”
19 Overview. EPA Letter to NMFS (Oct. 13, 2004) (Exh. 2 to EPA’s Opp.). Despite the fact that
20 the original (and now deficient) effects determinations were required to be made in accordance
21 with a schedule embodied in this Court’s Order, EPA has refused to commit to a timeframe for
22 revising its effects determinations and the body of information submitted to NMFS for
23 consultation. The purpose of this motion is to obtain modification of the July 2, 2002 Order to
24

1 impose such a schedule.

2 Both EPA and defendant-intervenors CropLife et al. seek to characterize this motion as
3 challenging the methodology and science underlying the effects determinations EPA has made to
4 date. While the Toxics Coalition has been critical of EPA's risk assessments, and it sent a 60-
5 day notice as a prelude to a separate challenge to the effects determinations, EPA's response
6 changed the nature of the controversy. In response to the 60-day notice, EPA acknowledged that
7 it needed to update its effects determinations to incorporate the revisions of its risk assessment
8 process made in response to the Services' extensive critiques of EPA's prior risk assessments.
9 See EPA 60-Day Notice Response (Sept. 24, 2004) (Exh. 3 to 5th Goldman Decl.).² In light of
10 this response, it would be a waste of judicial resources and possibly not present a justiciable
11 controversy for the Toxics Coalition to bring a challenge to effects determinations that EPA has
12 committed to redo. Instead, the Toxics Coalition decided that it would be prudent to refrain from
13 challenging the current effects determinations in order to allow EPA to apply its new risk
14 assessment process to these pesticides.

15 However, EPA has refused to commit to a timetable for revising its prior effects
16 determinations and for submitting the best and most complete science to NMFS for the
17 consultations this Court ordered EPA to initiate. EPA seeks to avoid such a timetable by
18

19 ² Both EPA and CropLife attack the NMFS's draft nonconcurrence letter that the Toxics
20 Coalition attached to its 60-day notice (Exh. 2 to 5th Goldman Decl.) since NMFS did not
21 officially sign and send that letter. NMFS's critiques of EPA's risk assessments, however, are
22 well known, having been expressed in various forms over time. The 60-day notice quotes from
23 several NMFS's biological opinions that criticize EPA's risks assessments for sublethal, indirect,
24 and other effects, as well as from FWS's extensive criticisms of EPA's risk assessments. Exh. 1
25 to 5th Goldman Decl. at 8-11. The Toxics Coalition has submitted these critiques to this Court,
26 see 4th Code Decl. ¶¶ 5-11 & Exh. 1-3, and this Court made findings based on some of these
critiques in support of its conclusion that interim buffers were warranted. August 8, 2003 Order
at 14-16. Moreover, EPA has acknowledged in many of its original effects determinations that
its prior approach to sublethal effects "needs to be re-evaluated." E.g., 4th Code ¶ 12 & Exh. 4-7.
REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO MODIFY
JULY 2, 2002 ORDER TO ESTABLISH SCHEDULE FOR
DEFENDANT TO REVISE THE REQUIRED EFFECTS
DETERMINATIONS (C01-0132C) - 2 -

1 presenting a hypertechnical defense.

2 On the one hand, EPA acknowledges that the ESA commands it to use the best available
3 scientific information in discharging its section 7(a)(2) obligations and that this mandate extends
4 both to EPA's effects determinations and to its obligation to submit to NMFS sufficient
5 information for a consultation. See EPA Opp. at 6 ("plaintiffs are correct that the action agency
6 has a responsibility to provide the best scientific and commercial data available to the Services").
7 EPA also acknowledges that it must provide NMFS a description of "the manner in which the
8 action may affect the species or critical habitat and analysis of cumulative effects, relevant
9 reports, and other available information." EPA Opp. at 6, citing 50 C.F.R. § 402.14(c).

10 On the other hand, EPA contends that it has no obligation to use the best science or to
11 provide NMFS the complete body of information needed for an adequate review of the
12 pesticide's effects at the initiation stage, but rather has such duties only at some time "during the
13 consultation." EPA Opp. at 7. EPA then points to the regulation that allows the Services to
14 request additional information and requires the action agency to provide such requested
15 information. 50 C.F.R. § 402.14(f).³ While this regulation imposes additional duties on EPA to
16 provide information that NMFS deems necessary for the consultation, it does not obviate EPA's
17 independent duty prescribed in the Act to use the best science in discharging its section 7(a)(2)
18 responsibilities. ESA Section 7(a)(2) expressly requires that: "In fulfilling the requirements of
19 this paragraph, each agency shall use the best scientific and commercial data available." This
20 mandate extends to both EPA as the action agency and NMFS as the expert fish and wildlife

21
22 ³ EPA also distinguishes a regulation requiring a biological assessment for construction
23 activities, but the Toxics Coalition never contended that EPA had to initiate consultation by
24 transmitting a biological assessment to NMFS. EPA Opp. at 7 n.5. The form of the effects
determinations and initiations of consultation is not at issue.

1 agency. Its absolute language allows no room to exempt EPA's effects determinations and
2 initiations of consultation from the best science mandate, nor does EPA offer any basis for such
3 an exemption. The fact that NMFS may request additional information during the course of a
4 consultation does not give EPA a license to make its effects determinations and initiation
5 requests based on only a portion of the scientific evidence in its possession.

6 EPA's legal position is particularly problematic with respect to its "no effect"
7 determinations because EPA will never submit "no effect" pesticide uses to NMFS for
8 consultation. An EPA "no effect" determination is the final word. NMFS will, therefore, never
9 have the opportunity to request additional scientific information "during the consultation," the
10 point in time allotted by EPA for correcting the inadequate scientific record. EPA Opp. at 7.

11 EPA has admittedly based its initial effects determinations on outdated risk assessments
12 and incomplete science. There is no factual dispute as to this point. EPA conducted the risk
13 assessments underlying its initial effects determinations using the approach that NMFS and FWS
14 found deficient. EPA subsequently changed its risk assessment approach in response to the
15 Services' critiques as a prelude to issuance of the self-consultation regulations that eliminate the
16 Services' oversight of whole categories of EPA's effects determinations for pesticides. 69 Fed.
17 Reg. 47,732 (Aug. 5, 2004) (self-consultation regulation).

18 In order to incorporate the best available science into its effects determinations and
19 initiations of consultation, EPA will need to apply its new risk assessment approach to the
20 pesticides at issue. Indeed, EPA has promised NMFS that it will review and update its effects
21 determinations "to ensure the assessments follow the approach described in EPA's" Overview.
22 EPA Opp. Exh. 2. For their part, NMFS and FWS have represented that the revised risk
23 assessment relies upon the best science and should produce both credible effects determinations
24

1 and sufficient information to initiate consultations. 69 Fed. Reg. at 47,735. This representation
2 stands in sharp contrast to the Services' previous critiques of EPA's risk assessments as ignoring
3 significant impacts and data.

4 Because this Court's July 2002 Order did not prescribe the scientific criteria for the
5 effects determinations and consultations, EPA believes the Court cannot order EPA to revise
6 those determinations using EPA's updated risk assessment process. However, this Court likely
7 presumed that EPA would use the best available science in making its effects determinations and
8 initiating consultations, since the ESA requires it to do so. This motion does not ask the Court to
9 scrutinize EPA's risk assessment process. Both the Services and EPA have already applied that
10 scrutiny resulting in substantial revisions to EPA's risk assessment approach. Moreover, both
11 EPA and NMFS acknowledge that the revised approach must form the basis for EPA's effects
12 determinations and the consultations that will ensue.⁴

13 The sole question is whether EPA must incorporate this improved science into its effects
14 determinations and initiations of consultation on a timely basis or whether it can wait until some
15 indeterminate point "during the consultation" to revise its findings. If EPA waits, as it proposes
16 to do (EPA Opp. at 7), it would never revisit the "no effect" determinations that have terminated
17 the consultation process before it began. EPA's plea for open-ended discretion to update its
18 effects determinations and initiations of consultation whenever it sees fit is reminiscent of its
19 cavalier attitude precipitating this litigation. The ESA imposes mandatory duties on EPA to
20 consult on its pesticide registrations to ensure that it is not authorizing pesticide uses that
21

22 ⁴ The Toxics Coalition does not believe the revised risk assessment approach is a panacea
23 correcting all defects identified by the Services in the past. The sufficiency of the new process is
24 not at issue in this motion, although it is relevant to the challenge to the self-consultation
regulations in Washington Toxics Coalition v. Dep't of Interior, No. C04-1998C (filed Sept. 23,
2004).

1 jeopardize endangered species. EPA has honored this duty in the breach in the guise of putting it
2 off to an indeterminate future. Just as this Court imposed a timetable for EPA to make its initial
3 effects determinations, this motion asks the Court to impose a second timetable for EPA to revise
4 those effects determinations and initiations of consultation using EPA's new risk assessment
5 approach.⁵

6 For these reasons, and those set out in the motion, the Toxics Coalition asks the Court to
7 modify the July 2, 2002 Order to establish a one-year schedule for EPA to revise its effects
8 determinations and initiate consultations, as appropriate, for the 55 pesticides subject to that
9 Order.

10 Respectfully submitted this 22nd day of March, 2005.

11
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19 ⁵ The oppositions raise several matters that are not at issue. For example, EPA equates this
20 motion with a request to hold EPA in contempt of court for violating the July 2, 2002 Order.
21 EPA Opp. at 2-3. Plaintiffs Washington Toxics Coalition et al. have not accused EPA of
22 contempt and find it ironic that EPA seeks to escalate the dispute. Similarly, this motion does
23 not seek to modify the Court's January 22, 2004 injunction. Accordingly, the pending appeals,
24 which are limited to that injunction and which held up the July 2, 2002 schedule as an
25 appropriate remedy, have no bearing on this motion. In addition, the Toxics Coalition has not
26 asked the Court to invalidate EPA's effects determinations, but only to order EPA to make the
revised determinations according to a schedule. Since the requested relief would leave the past
effects determinations in place, it would not affect the reach of the injunction and "alter the
status quo drastically," as defendant-intervenors CropLife et al. erroneously contend. CropLife
Opp. at 10.

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

On March 22, 2005, I served a true and correct copy of:

1. Reply in Support of Plaintiffs' Motion to Modify July 2, 2002 Order to Establish Schedule for Defendant to Revise the Required Effects Determinations and Provide Adequate Foundation for Consultations.

on the parties listed below:

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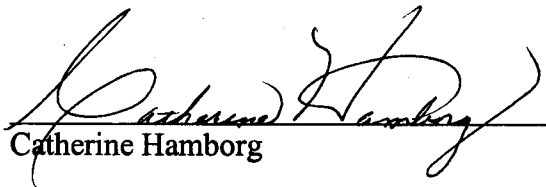
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18 I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and
19 correct. Executed this 22nd day of March, 2005, at Seattle, Washington.

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Catherine Hamborg

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